Malaysian Association of Private Colleges and Universities & Ors v Ketua Pendaftar Institusi Pengajian Tinggi Swasta & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–94–04 OF 2013
NIK HASMAT J
1 NOVEMBER 2016

Civil Procedure — Interrogatories — Application for leave — Applicants filed application for leave to administer interrogatories upon third respondent — Whether services rendered by third respondent have raised substantial and serious factual issues warranting court's issuance of the required leave — Whether application bona fide — Whether application for leave should be allowed — Rules of Court 2012 O 24 r 8 & O 53

The applicants had filed a judicial review application to quash circular issued by the first respondent to private institutions in Malaysia ('the circular') which pursuant to s 29 of the Private Higher Educational Institutions Act 1996 had introduced a new condition of registration of private institutions. The new condition required Malaysian private institutions, for the purpose of applying for an international student pass to study in Malaysia to use a system, the 'Student Applications and Registrations System', owned and operated by the third respondent which upon submission of the student pass, would be imposed a processing fee of RM1,000 by the third respondent. In relation to the judicial review application, the applicants filed the instant application ('encl 17') for leave to administer interrogatories upon the third respondent. The applicants sought, inter alia, discovery of the interrogatories and, require the third respondent to confirm if the third respondent had delegated or subcontracted its function stated in the circular to another entity, Scicom (MSC) Bhd ('Scicom') or any other entity related to Scicom. The third respondent further sought to confirm the third respondent's payment to Scicom or any related entity in consideration of the discharged services and whether the payment was monetary proceed from the RM1,000 processing fees of the third respondent.

Held, allowing encl 17 with costs in the cause:

(1) From the active and multifarious exchanged affidavits of parties, the services to be rendered by the third respondent pursuant to the circular was found to have raised substantial and serious factual issues warranting the court's issuance of the required leave for the sought interrogatories by the applicants. The evidence obtained from the interrogatories provides essential and material evidence to facilitate the court's adjudication of the

applicants' challenge. Further, the interrogatories application was bona fide, and there was no inordinate delay in its application (see paras 12–15).

(2) In the exercise of the courts discretion to grant leave for discoveries pursuant to O 53 of the Rules of Court 2012 ('the ROC'), such leave will be ordered only if it is found necessary, for the purpose of saving costs or for the fair disposal of the case within the meaning of O 24 r 8 of the ROC. The leave should be limited strictly to documents relevant to the issue which had emerged from the affidavit (see para 16).

[Bahasa Malaysia summary

Pemohon-pemohon telah memfailkan permohonan semakan kehakiman untuk membatalkan pekeliling yang dikeluarkan oleh responden pertama kepada institusi-institusi persendirian di Malaysia ('pekeliling') yang mana berikutan s 29 Akta Institusi Pendidikan Tinggi Swasta 1996 telah memperkenalkan syarat baru pendaftaran institusi-institusi persendirian. Syarat baru mengkehendaki institusi-institusi persendirian Malaysia, untuk tujuan memohon pas pelajar antarabangsa untuk belajar di Malaysia menggunakan sistem, 'Student Applications and Registrations System', yang dimiliki dan dijalankan oleh responden ketiga yang mana atas serahan pas pelajar, akan dikenakan fi pemprosesan sebanyak RM1,000 oleh responden ketiga. Berkaitan permohonan semakan kehakiman, pemohon-pemohon mefailkan permohonan ini ('lampiran 17') untuk izin mentadbir penyiasataan ke atas responden ketiga. Pemohon-pemohon memohon, antara lain, penemuan penyiasatan dan, mengkehendaki responden ketiga untuk mengesahkan jika responden ketiga telah mewakilkan atau subkontrak fungsinya yang dinyatakan di dalam pekeliling kepada entiti lain, Scicom (MSC) Bhd ('Scicom') atau apa-apa entiti lain yang berkaitan kepada Scicom. Responden ketiga selanjutnya memohon untuk mengesahkan bayaran responden ketiga kepada Scicom atau apa-apa entiti berkaitan dalam mempertimbangkan perkhidmataan perlepasan dan sama ada bayaran adalah hasil wang daripada RM1,000 fi pemprosesan responden ketiga.

Diputuskan, membenarkan lampiran 17 dengan kos dalam kausa:

(1) Daripada afidavit pertukaran pelbagai dan aktif pihak-pihak, khidmat yang akan diberikan oleh responden ketiga berikutan pekeliling didapati telah membangkitkan isu fakta serius dan substansial yang mewajarkan pengeluaran mahkamah terhadap izin yang dikehendaki bagi penyiasatan yang dipohon oleh pemohon-pemohon. Keterangan yang diperolehi daripada penyiasatan memberikan keterangan material dan penting untuk memudahkan penghakiman mahkamah terhadap cabaran pemohon-pemohon. Selanjutnya, permohonan penyiasatan adalah bona fide, dan tidak terdapat kelewatan dalam pemohonannya (lihat perenggan 12–15).

(2) Dalam menjalankan budi bicara mahkamah untuk memberikan izin bagi penemuan berikutan A 53 Kaedah-Kaedah Mahkamah 2012 ('KKM'), izin sedemikian akan diperintahkan hanya jika ia didapati perlu, bagi tujuan menjimatkan kos atau untuk perlepasan adil kes dalam maksud A 24 k 8 KKM. Izin patut dihadkan secara ketat kepada dokumen relevan kepada isu yang berbangkit daripada afidavit (lihat perenggan 16).]

Notes

For cases on application for leave, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5020–2027.

Cases referred to

Sheikh Abdullah bin Sheikh Mohamed v Kang Kock Seng [1975] 1 MLJ 89, FC (refd)

Legislation referred to

Private Higher Educational Institutions Act 1996 s 29, 30, 33
Rules of Court 2012 O 24 r 8, O 26 r 1, O 53, O 53 rr 3(2), 6

Gregory Dass (Shook Lin & Bok) for the applicants.
Haryati bt Ahmad (Federal Counsel, Attorney General's Chambers) for the first and second respondents.
Gopal Sreenevasan (Ravindran Shanmuganathan and Michelle Ng with him) (Sreenevasan Young) for the third respondent.

Nik Hasmat J:

INTRODUCTION

[1] This is the applicants'/plaintiffs' application pursuant to O 53 r 6, read with O 26 r 1 of the Rules of Court 2012 ('the Rules') dated 8 August 2014 vide encl 17 for leave to administer interrogatories as specified in Tab A, upon the third respondent. By way of an order dated 16 August 2016, the court allowed the applicants' application following which the third respondent filed an appeal against the order.

CAUSE PAPERS

[2] For the purpose of this leave, the relevant cause papers were filed and referred to by both parties:

(a) the application for judicial review dated 30 April 2013 ('encl 1');

(b) the statement pursuant to O 53 r 3(2) of the Rules of Court 2012 dated 30 April 2013 ('encl 2');

A (c) the applicants' notice of application for interrogatories dated 8 August 2014 ('encl 17');

(d) the applicants' affidavit in support affirmed by Ms Jodhy Seenivasagam on 8 August 2014 ('encl 18');

B (e) the third respondent affidavit No 5 affirmed by Mr Mohd Yazid Abd Hamid on 18 September 2014 ('encl 21');

(f) the applicants' affidavit in reply affirmed by Jodhy Seenivasagam on 2 October 2014 ('encl 22');

C (g) the applicants' further affidavit affirmed by Jodhy Seenivasagam on 9 October 2014 ('encl 24'); and

(h) the applicants' affidavit in support (2) affirmed by Ms Jodhy Seenivasagam on 15 October 2014 ('encl 29').

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FACTUAL BACKGROUND

[3] The applicants filed an application for judicial review to quash the circular issued by the first respondent dated 23 January 2013 to private E institutions in Malaysia ('the circular') which pursuant to s 29 of the Private Higher Educational Institutions Act 1996 ('the Act'), had introduced a new condition of registration for private institutions. The new condition require Malaysian private institutions, for the purpose of applying for an international student pass to study in Malaysia to use a system, the Student Applications and F Registrations System, owned and operated by the third respondent which upon submission of the student pass, would be imposed a processing fee of RM1,000 by the third respondent.

G **[4]** The third respondent, described in the circular as a non-profit company limited by guarantee was to carry out the function of promoting, marketing and, management of international students into Malaysia and, was to be placed under the control of Ministry of Higher Education, Malaysia as one stop centre for matters relating to the entry of foreign students into Malaysia.

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[5] On 24 June 2014, the third respondent was issued a letter by the applicants seeking discovery of the interrogatories as stipulated in Tab A. The third respondent by way of letter dated 22 July 2014, stated that the third respondent will not be providing the answers to the sought interrogatories. The I applicants thus filed an application for leave to administer interrogatories upon the third respondent as in encl 17.

THE APPLICANTS' APPLICATION — ENCL 17

[6] The applicants interrogatories application against the third respondent sought discovery of the interrogatories and, require the third respondent to confirm if the third respondent had delegated or subcontracted its function stated in the circular to another entity, Scicom (MSC) Bhd ('Scicom') or any other entity, related to Scicom.

[7] The third respondent was further sought to confirm the third respondent's payment to Scicom or any related entity in consideration of the discharged services and, whether the payment was monetary proceed from the RM1,000 processing fees of the third respondent.

THE APPLICANTS' CONTENTION

[8] The first respondent's decision to issue the circular was unlawful, and ultra vires the first respondent's powers under ss 29, 30 and 33 of the Act. The first respondent's imposition of an additional condition for registration was an unreasonable and irrational exercise of its powers pursuant to s 29 of the Act.

[9] The discharge of the third respondent's function by Scicom was evident from the publication on the internet of a financial report dated 23 September 2014 which stated in the following:

> Company expects EMGS to provide strong recurring income. Scicom processes visas for all foreign students seeking to study in Malaysia via EMGS (Education Malaysia which is a wholly-owned subsidiary of the Malaysian Ministry of Education)...

[10] Scicom's role and, involvement in the discharge of the third respondent's function in the processing of the international students pass application is further evident from an online article dated 7 October 2014 stating the following:

> Affin said the crown jewel of Scicom is the business segment associated with the processing of all visa via Education Malaysia Global Services (EMGS) for foreign students pursuing education in the country.
>
> The research house expects Scicom's pretax margins to steadily increase to 21% by FY17 from 14% in FY14 as the earnings generated from EMGS doubles to RM22mil.

GROUNDS FOR ALLOWING THE APPLICANTS' APPLICATION

[11] In allowing discovery in a judicial review application, the court took into consideration all material evidence and disputed facts which was found to

be consistent with the applicants' contention of serious issues and, questions of fact, entitling the court to make an order of discovery.

[12] In this regard, from the active and multifarious exchanged affidavits of parties, the services to be rendered by the third respondent pursuant to the circular was found to have raised substantial and serious factual issues warranting the court's issuance of the required leave for the sought interrogatories by the applicants.

[13] The applicants judicial review application was undisputedly, a challenge on the legality and validity of the status of the first respondent's circular as evident from the grounds for the application and, reliefs sought by the Malaysian private institutions as collectively as the applicants in their joint application for judicial review as per encls 1 and 2.

[14] The evidence obtained from the interrogatories provides essential and material evidence to facilitate the court's adjudication of the applicants' challenge. The judicial review proceeding filed by the applicants' against the respondents, was fundamentally premised on the applicants' pleaded case that the circular's issuance was ultra vires the Act and, made on unreasonable and irrational grounds.

[15] Having perused and evaluated the sought interrogatories in it's entirety and, in the context of parties' exchanged affidavits, it was evident to the court that the interrogatories application was bona fide, and that there was no inordinate delay in it's application as the applicant had filed the application following the respondents' failure to accede to it's request to provide the interrogatories. Given that the exchanged affidavits particularly affidavits of the first respondent and, the second respondent, had not made any reference to the purported involvement of a third party Scicom, in the discharge of the third respondent's services as was conferred in the first respondent's circular. In this regard, the court is in agreement with the applicants' contention that had the third respondent made any reference to Scicom's role in their affidavits, there would not be any necessity for the applicants' issuance of the letter dated 24 June 2014 and, the interrogatories application.

[16] In the exercise of the court's discretion to grant leave for discoveries pursuant to O 53 of the Rules, such leave will be ordered only if it is found necessary, for the purpose of saving costs or for the fair disposal of the case within the meaning of O 24 r 8 of the Rules. The leave should be limited strictly to documents relevant to the issue which had emerged from the affidavits. The applicants' cited the Federal Court case in *Sheikh Abdullah bin Sheikh Mohamed v Kang Kock Seng* [1975] 1 MLJ 89, held:

In considering whether the interrogatories should be allowed or not the court must

consider whether they are designed to obtain admissions of facts which will reduce the issuance, shorten the length of the trial and thus save costs. In our judgment the interrogatories in this case satisfied all those tests.

[17] Accordingly, premised on the aforesaid grounds and, in the light of the cited authority, the court thus allowed the applicants' application for leave to administer the interrogatories on the third respondent as in Tab A with cost in the cause.

Enclosure 17 allowed with costs in the cause.

Reported by Dzulqarnain Ab Fatar